Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1687

In re LEON W. KNIGHT, *et alia, Petitioners.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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OCTOBER TERM, 1979

No.

In re LEON W. KNIGHT, *et alia, Petitioners.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Leon W. Knight, *et alia,* respectfully pray that this Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on 1 February 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported, and appears in Appendix A, *post* pp. 1a-2a. The order of the Court of Appeals denying Petitioners rehearing and rehearing en banc is unreported, and appears in Appendix B, *post* p. 3a. The order of the three-judge United States District Court for the District of Minnesota is unreported, and appears in Appendix C, *post* pp. 5a-7a.

JURISDICTION

The Court of Appeals filed its opinion on 1 February 1980, and denied Petitioners rehearing and rehearing en banc on 25 February 1980. Appendices A and B, *post* pp. 1a-2a, 3a. Petitioners' request for a writ of certiorari comes less than ninety (90) days from either of those dates. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) (1976).

QUESTION PRESENTED

Did the three-judge District Court abuse its discretion and usurp power under Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and under the Fifth Amendment to the United States Constitution, when:

A. on 13 October 1978, it established a discovery-schedule, terminating Petitioners' discovery on 31 December 1978; and

B. after Petitioners moved on 30 December 1978 to re-open and extend discovery, it denied Petitioners' motion without either hearing or opinion, in the face of Petitioners' unrefuted showing that

1. material evidence exists in exclusive possession of certain corporations and private associations from whom Petitioners sought discovery;

2. officials and staff-personnel of those organizations testified falsely, evasively, or incompletely under oath in depositions;

3. the organizations and their attorneys wilfully withheld and destroyed evidence that Petitioners requested, and the District Court ordered, be produced;

4. record-evidence documenting the conspiracy to proffer false testimony and to suppress physical evidence became available only fifty two (52) or more days after the District Court promulgated its discovery-schedule on 13 October 1978; and

5. Petitioners filed their motion to reopen and extend discovery but twenty seven (27) days after they obtained the first record-evidence of the conspiracy, and only nine (9) days after they had complete record-evidence thereof?

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This case involves the Fifth Amendment to the United States Constitution, and Federal Rules of Civil Procedure 16, 26, 30, 34, and 37.

The full text of these provisions appears in Appendix D, *post* pp. 9a-13a.

STATEMENT OF THE CASE

On 16 July 1979, Petitioners filed with this Court their Motion for Leave to File Petition for Extraordinary Writ, their Petition for Extraordinary Writ, and their supporting Appendices, praying that this Court issue a writ of mandamus commanding the three-judge United States District Court for the District of Minnesota convened in this case to grant Petitioners' motion in that court to re-open and extend discovery. *Knight* v. *Heaney,* No. 79-75 (U.S., filed 16 July 1979). Petitioners respectfully refer this Court

to the aforesaid Petition and Appendices for a complete and detailed statement of the case.

In summary, the record establishes that, during the course of discovery in the District Court from approximately February, 1977, through December, 1978, defendants National Education Association, Minnesota Education Association, Minnesota Community College Faculty Association, Independent Minnesota Political Action Committee for Education, and certain of their officials, staff-personnel, and attorneys [hereinafter collectively styled the "United Teaching Profession", or "UTP"] conspired to and did: (i) proffer false, evasive, and incomplete testimony under oath in depositions; (ii) sequester and destroy documentary evidence; and (iii) otherwise impede Petitioners' acquisition of evidence relevant to the federal constitutional and statutory claims Petitioners raise under 42 U.S.C. §§ 1983, 1985, and 1986 (1976) in the District Court.

During the course of this conspiracy, and before Petitioners had acquired record-evidence of the UTP's wrong-doing, the District Court held a pre-trial hearing on 13 October 1978, and ordered that Petitioners' discovery terminate on 31 December 1978. Subsequent to that hearing, Petitioners conducted further discovery, leading to full exposure of the conspiracy. However, record-evidence supporting any of Petitioners' charges did not become available until fifty two (52) or more days after the hearing of 13 October; and record-evidence fully substantiating Petitioners' allegations became available only after 22 December 1978, some nine (9) days before the termination of discovery. *See* Table, *post* pp. 6-7.

With complete evidence in hand, on 30 December 1978 Petitioners filed a motion in the District Court

to re-open and extend discovery. On 4 April 1979, the District Court denied Petitioners' motion—without hearing, findings, or opinion. Appendix C, *post* pp. 5a-7a.

Petitioners then sought the intervention of this Court by petition for extraordinary writ in the nature of mandamus. *Knight* v. *Heaney,* No. 79-75 (U.S., filed 16 July 1979). On 1 October 1979, this Court denied Petitioners leave to file their Petition for Extraordinary Writ. Appendix E, *post* p. 15a.

On 24 October 1979, Petitoners filed their petition *sub nomine* In re *Knight* in the United States Court of Appeals for the Eighth Circuit. The Court of Appeals heard oral argument on 17 January 1980, and filed its opinion denying Petitioners relief on 1 February 1980. Appendix A, *post* pp. 1a-2a. In that opinion, the Court of Appeals ruled that this case presented no extraordinary factual circumstances, and that Petitioners were not entitled to a writ of mandamus because: (i) the District Court had established a discovery-schedule; and (ii) Petitioners made only a "last minute objection to the cutoff time". On 11 February 1980, Petitioners requested rehearing and rehearing en banc from the Court of Appeals, which request that Court denied on 25 February 1980. Appendix B, *post* p. 3a.

Petitioners now re-invoke this Court's jurisdiction to review the Court of Appeals' holding that Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and the Fifth Amendment to the United States Constitution, permit a District Court to license civil litigants to testify falsely and evasively under oath, and to suppress and destroy documentary evidence.

TABLE

Conspirator-deponent and date of deposition	Source of evidence of false testimony and date evidence first adduced	Calendar days from 13 Oct. 1978 to receipt of transcript (Column 2) providing record-evidence of conspiracy	Calendar-days from receipt of transcript (Column 2) to 31 Dec. 1978
Chesebrough, 22-23 Feb. 1977	Zagrabelny, Dep'n on 17 Nov. 1978; Dep'n trn. rec'd on 8 Dec. 1978	56	23
Mammenga, 12-13 Jun. 1978	Zagrabelny, Dep'n on 17 Nov. 1978; Dep'n trn. rec'd on 8 Dec. 1978	56	23
Sands, 14 Jun. 1978	Zagrabelny, Dep'n on 17 Nov. 1978; Dep'n trn. rec'd on 8 Dec. 1978	56	23
Letorney, 24-25 Jul. 1978	Baker, Dep'n on 19-20 Oct. 1978; Dep'n trn. rec'd on 18 Dec. 1978 (Vol. 1), 31 Dec. 1978 (Vol. 2)	66 (Vol. 1) 79 (Vol. 2)	13 (Vol. 1) 0 (Vol. 2)
Johnson, 7-8 Sept. 1978	Zagrabelny, Dep'n on 17 Nov. 1978; Dep'n trn. rec'd on 8 Dec. 1978	56	23

McFarland, 17-18 Oct. 1978	Harman, Dep'n on 28 Nov. 1978; Dep'n trn. rec'd on 7 Dec. 1978	55	24 [27 after McFarland dep'n]
Baker, 19-20 Oct. 1978	Harman, Dep'n on 28 Nov. 1978; Dep'n trn. rec'd on 7 Dec. 1978	55	24
Bresin, 16 Nov. 1978	Saunders, Dep'n on 30 Nov. 1978; Dep'n trn. rec'd on 4 Dec. 1978	52	27
Vander Woude, 20 Nov. 1978	Saunders, Dep'n on 30 Nov. 1978; Dep'n trn. rec'd on 4 Dec. 1978	52	27
Harman, 28-29 Nov. 1978	Lowell, Dep'n on 6-8 Dec. 1978; Dep'n trn. rec'd on 22 Dec. 1978	70	9
Lowell, 6-8 Dec. 1978	Lowell, Dep'n on 6-8 Dec. 1978; Dep'n trn. rec'd on 22 Dec. 1978	70	9

REASONS FOR GRANTING THE WRIT

I. This case presents an extraordinary, shocking, and perhaps unique chronicle of wrongdoing by civil litigants intent on suppressing evidence of their illegal conduct by any means.

The petition and briefs originally filed with this Court in *Knight* v. *Heaney* contain all the legal authorities on which Petitioners and the UTP have relied heretofore. And neither the District Court nor the Court of Appeals referred to any other authorities in denying Petitioners' requests for relief from the UTP's conspiracy to obstruct justice in this case. Yet none of these authorities, all ultimately favorable to Petitioners, chronicles a conspiracy to "cover-up" material evidence as extensive and malevolent as Petitioners exposed in the courts below.

No other federal case that Petitioners, the UTP, and the lower courts here have gleaned from the reporting services has involved either: (i) the number of deponents—no less than eleven—that Petitioners established testified falsely under oath; or (ii) the masses of documentary evidence that Petitioners proved the UTP withheld from production, destroyed, or otherwise suppressed. No other federal case relied upon here has involved such blatant and unabashed admissions by deponents and their attorneys as the UTP's officials, staff-personnel, and counsel openly made on the record, boastfully acknowledging their suppression and destruction of documentary evidence and implicating each other in a web of lies proffered under oath. And no other federal case cited in this matter has involved the amazing discoveries of Petitioners' private investigator who, even while the UTP falsely denied its involvement in electoral politics in

Minnesota, exposed one of its paid staff-men operating a telephone-bank under an assumed name on behalf of a candidate for United States Senate from that State during the 1978 elections—and then learned from another UTP staff-man that these machinations resulted from the instructions of the UTP's attorneys as a direct result of the prosecution of this very case.

In sum, this case may well involve the most far-reaching and brazen "cover-up" of evidence yet recorded in civil litigation in the federal courts.

II. This case presents an unprecedented perversion of the Federal Rules of Civil Procedure that neither the District Court nor the Court of Appeals could rationalize.

In the face of Petitioners' unrefuted exposure of the UTP's "cover-up", the District Court was unable to articulate any reason whatsoever for denying Petitioners relief. *See* Appendix C, *post* pp. 5a-7a. And the Court of Appeals put forward only silence and nonsense in support of the District Court's action. *See* Appendix A, *post* pp. 1a-2a.

First, the Court of Appeals made no mention of the conspiracy Petitioners exposed—refraining even from identifying the UTP as a defendant below. Its opinion contains no denial of Petitioners' charges, no finding that Petitioners failed to prove those charges, and no determination that the UTP seriously challenged, let alone refuted, Petitioners' proofs. Neither did the Court of Appeals proffer even the ludicrous and feckless excuses that Petitioners' exposure of the "cover-up" is irrelevant to their request to re-open discovery, that the Federal Rules of Civil Procedure license "cover-ups" as proper pre-trial tactics, that federal

trial courts normally (or ever) have discretion to reward civil litigants for their false testimony and suppression of documentary evidence, or that federal appellate courts should not concern themselves with such matters. Following Wittgenstein's *dictum* that *"Wovon mann nicht sprechen kann, darube muss mann schweigen"*, the Court of Appeals consigned the embarassing facts of this case to oblivion.

Second, the Court of Appeals cited no statute, rule of court, judicial decision, legal treatise, or doctrine sanctioning false testimony given under oath, excusing the suppression and destruction of evidence, or sustaining the wilfull violation of court-orders to make discovery. Neither did the Court of Appeals outline any chain of reasoning, howsoever tortuous, leading from the uncontroverted fact of the conspiracy to the District Court's naked *fiat* that the UTP's malfeasance merits judicial protection and approval. Instead, it merely pretended that this case does not involve any extraordinary or exceptional circumstances, carefully avoiding reference to what actually transpired during discovery below.

Finally, the Court of Appeals berated Petitioners for their "last minute objection to the [discovery] cutoff time" established at the District Court's hearing of 13 October 1978. The Court of Appeals carefully neglected to note, however, that in every instance the record-evidence exposing the "cover-up" *post*-dates by at least fifty two (52) days the 13 October hearing. *See* Table, *ante*. Moreover, from the time they unmasked the first perjurer, Petitioners used in preparing their motion to re-open discovery only twenty seven (27) days after receipt of record-evidence in the relevant deposition-transcript. And, from the time

they brought the entire conspiracy to light, Petitioners used but nine (9) days after record-evidence in the last deposition-transcript became available.

In short, the sole faults the Court of Appeals could attribute to Petitioners—the *victims* of the "cover-up", not its perpetrators—were: (i) that Petitioners failed to predict on 13 October 1978 what they would discover fifty two (52) or more days thereafter; and (ii) that, having exposed the "cover-up" through their own diligence, Petitioners expended nine (9) calendar-days, including the 1978 Christmas holidays, to prepare and serve their motion to re-open discovery. The UTP carried out a "cover-up" in defiance of the Federal Rules of Civil Procedure for some twenty two (22) *months*—but, according to the Court of Appeals, Petitioners are entitled to no relief because they took nine (9) *days* after accumulating all the evidence to bring the matter to the District Court's attention! Even in one of Kafka's novels, this obvious white-washing of the UTP's conspiracy would appear strained and unreasonable. As the one and only prop for the decision of a federal appellate court, it is simply appalling.

III. This case presents a classic situation for intervention by writ of certiorari, in order to prevent irreparable injury to Petitioners and to preserve this Court's appellate jurisdiction over the constitutional issues Petitioners have raised below.

Without full discovery, Petitioners may be unable adequately to present their case at trial. If the UTP's "cover-up" does result in a judgment adverse to Petitioners, this Court on appeal will inevitably reverse and remand—not, however, for a new trial that could

accomplish nothing, but for further discovery to purge the case of the UTP's pre-trial wrong-doing. Whether that discovery succeeds, though, will depend upon the fortuitous availability of witnesses and the extent of their detailed recall of events that transpired years before, and upon the existence of documents that Petitioners have proven the UTP is now destroying or otherwise making unavailable. If its already exposed scheme of suppressing evidence portends future events, by the time discovery begins again on remand after appeal to this Court, the UTP will have perfected its "cover-up" and forever precluded Petitioners from collecting the evidence to which they are entitled.

Moreover, the UTP's lawlessness, as now condoned and rewarded by the District Court and the Court of Appeals, may foreclose immediate appellate review by this Court of the constitutional issues Petitioners raise below. In addition, even after this Court reverses a judgment against Petitioners. and remands for further discovery and a new trial, the lower-courts' actions may still defeat appellate review of the merits by affording the UTP sufficient time to consolidate its "cover-up" through destruction of documents and coaching of witnesses.

CONCLUSION

Material evidence exists within the exclusive control of the UTP. Throughout the course of this litigation below, however, the organization and its agents have illegally withheld or falsified much of this evidence. And although Petitioners have exposed the UTP's wrong-doing, the District Court and the Court of Appeals have sanctioned its malfeasance anyway. This

result self-evidently offends the Federal Rules of Civil Procedure and the Fifth Amendment to the United States Constitution. Furthermore, unless reversed, it will irreparably injure Petitioners, will defeat this Court's appellate jurisdiction over the constitutional merits of this case, and will encourage wholesale disregard of the federal discovery-rules by every civil litigant with something to hide and the temerity to hide it.

For these reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Attorney for Petitioners

25 April 1980

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit (1 Feb. 1980)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1910

IN RE: LEON W. KNIGHT, ET AL., *Petitioners.*

Petition for Writ of Mandamus Directed to the United States District Court for the District of Minnesota

Submitted: January 17, 1980

Filed: February 1, 1980

Before GIBSON, Senior Circuit Judge, and ROSS and HENLEY, Circuit Judges.

PER CURIAM.

Petitioners, Leon W. Knight, *et al.*, petition this court to issue an extraordinary writ in the nature of mandamus to compel the three-judge district court to reopen discovery. We deny the petition.

Petitioners are twenty faculty members of the Minnesota community colleges who, by and with the assistance of the National Right to Work Legal Defense Foundation, filed a lawsuit in 1974 challenging the constitutionality of public sector collective bargaining in Minnesota. In 1976, the United States Court of Appeals for the Eighth Circuit ordered the convening of a three-judge court to consider the allegations and the Honorable Gerald W. Heaney, circuit judge, and the Honorable Earl R. Larson and Donald D. Alsop, district judges, were impaneled to constitute that court. This three-judge court, through Judge Alsop, periodically communicated with the parties to monitor the progress of the case; and in September of 1978, scheduled a pretrial hearing for October of that year. At this hearing, the court discussed the current status of discovery and subsequently ordered a discovery deadline of

December 31, 1978. This date was approximately two and one-half years since the convening of the three-judge court and was specifically approved in statements made by petitioners' counsel that they would have no difficulty completing discovery by mid-December 1978. Petitioners conducted discovery both before and after the October hearing without any complaints to the district court concerning recalcitrant witnesses, answers to interrogatories or cooperation of counsel of any sort. On December 30, one day before the deadline, they moved for rescission of the December 31 deadline and requested sanctions. Petitioners' motion was denied after a hearing.

The remedy of mandamus has been described by the Supreme Court as a drastic one, to be invoked only in extraordinary situations. *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976). In fact, "only exceptional circumstances amounting to a judicial 'usurpation of power' " is said to justify the invocation of this extraordinary remedy. *Id.* Additionally, the issuance of such writ is in large part a matter of discretion with the court to which the petition is addressed. *Id.* at 403. Mandamus, as an extraordinary writ, is only rarely available to interfere with the district court's processing of its cases. This is not such a case.

In light of these guidelines and in consideration of the length of discovery formally agreed to by the petitioners and the last minute objection to the cutoff time, we cannot say the district court abused its discretion in not extending discovery.

Petition denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

Order of the United States Court of Appeals for the Eighth Circuit (25 Feb. 1980)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

79-1910

IN RE: LEON W. KNIGHT, ET AL., *Petitioners.*

ORDER

The Court having considered petition for rehearing en banc filed by counsel for petitioners and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 25, 1980

APPENDIX C

Order of the United States District Court for the District of Minnesota (4 Apr. 1979)*

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* Portions of this Order not relevant to the Petition for A Writ of Certiorari have been excised.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, *et al., Plaintiffs,*

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.,*

Defendants.

ORDER

This matter comes before the court upon the following motions:

1. A motion of the plaintiffs for an order rescinding this court's order of October 13, 1978 (sic October 16, 1978) and entering an order commanding the production of certain files maintained by, the depositions of certain staff personnel of, and the payment of certain costs and fees by defendants National Education Association, Minnesota Education Association, Minnesota Community College Faculty Association, and Independent Minnesota Political Action Committee for Education.

* * * *

The court having met and considered the matter, and upon all files, records and proceedings herein,

IT IS ORDERED That the motion of the plaintiffs as hereinabove set forth be and the same hereby is in all things denied.

* * * *

IT IS FURTHER ORDERED:

1. On or before May 7, 1979 each of the parties hereto shall, by and through their counsel and if necessary by

their personal presence, meet, prepare, and enter into a stipulation of undisputed facts. Such stipulation shall set forth, seriatim, such facts as are undisputed or about which there is no genuine issue, without regard to the relevancy thereof. If the court finds that any party to the action has failed to reasonably comply with the terms of this order, it shall invoke the sanctions of Rule 37 of the Federal Rules of Civil Procedure, together with such other sanctions as are available to it.

2. On or before May 21, 1979, counsel for each party shall prepare, file and serve upon opposing counsel a statement setting forth all facts in issue which remain unresolved and which it proposes to submit to the court for determination.

3. On or before June 4, 1979, counsel for each party shall prepare, serve and file a schedule of all exhibits which will be offered in evidence at the trial as part of its case in chief.

4. On or before June 4, 1979, counsel for each party shall mark for identification in the sequence proposed to be offered all exhibits intended to be offered at trial.

5. On or before June 4, 1979, counsel for each party shall prepare, serve and file a schedule of depositions or portions thereof it proposes to offer in evidence.

6. On or before June 4, 1979, counsel for each party shall prepare, serve and file a schedule of interrogatories and answers to interrogatories that it proposes to offer in evidence.

7. On or before June 4, 1979, counsel for each party shall prepare, serve and file a full and complete statement of the facts it proposes to prove as part of its case in chief, setting forth such facts in separately numbered para-

(a) references to stipulations, depositions, or responses to Interrogatories, by page and number, as to each such fact;

(b) the name and address of each witness who might be called to testify and a brief summary of the substance of the testimony of each such witness.

8. On or before June 18, 1979, each party shall file a detailed written brief setting forth separately the legal issues for determination by this court, the relief sought by the plaintiffs, the defenses, including affirmative defenses of the defendants to plaintiffs' claims, and a precise statement of the legal contentions of the party filing the brief with identification of the authorities claimed to support such positions. Such briefs shall not exceed fifty (50) pages in length.

IT IS FINALLY ORDERED That a further hearing herein be conducted by the court on the 29th day of June, 1979, at 9:30 a.m. at the Federal Courts Building in St. Paul, Minnesota.

DATED: April 4, 1979.

/s/ GERALD W. HEANEY
Gerald W. Heaney
United States Circuit Judge

/s/ EARL R. LARSON
Earl R. Larson
United States District Judge

/s/ DONALD D. ALSOP
Donald D. Alsop
United States District Judge

APPENDIX D

Fifth Amendment to the United States Constitution and Federal Rules of Civil Procedure 16, 26, 30, 34, and 37

United States Constitution Amendment V

* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

Federal Rule of Civil Procedure 16

RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided

and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Federal Rule of Civil Procedure 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY.

(a) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; * * * production of documents or things or permission to enter upon land or other property, for inspection and other purposes; * * * and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> * * * *

(c) PROTECTIVE ORDERS. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending * * * may make any order which justice requires to protect a

party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; * * * (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters * * *.

Federal Rule of Civil Procedure 30

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.

(a) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e) * * *.

* * * *

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * * *

Federal Rule of Civil Procedure 34

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served * * *.

(b) PROCEDURE. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. * * * The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Federal Rule of Civil Procedure 37

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS.

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons

affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 * * *, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. * * *

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. * * *

APPENDIX E

Order of the United States Supreme Court (1 Oct. 1979)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1979

Edwin Vieira, Jr., Esq.
12408 Greenhill Drive
Silver Spring, MD 20904

RE: Leon W. Knight, et al.
v. Gerald W. Heaney, United States
Circuit Judge, et al.
No. 79-75

Dear Mr. Vieira:

The Court today entered the following order in the above-entitled case:

The motion for leave to file a petition for a writ of mandamus and/or prohibition is denied.

Very truly yours,

/s/ MICHAEL RODAK, JR., Clerk
Michael Rodak, Jr.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 33(1) of the Rules of this Court, I have served three (3) copies of Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on each of the following, by mailing said copies to the addresses listed below, first-class postage-prepaid priority mail.

The Honorable Floyd R. Gibson
The Honorable Donald R. Ross
The Honorable J. Smith Henley
c/o Mr. Robert D. St. Vrain,
Clerk
United States Court of Appeals
for the Eighth Circuit
St. Louis, Missouri 63101

The Honorable Gerald W. Heaney
The Honorable Earl R. Larson
The Honorable Donald D. Alsop
c/o Mr. Gerald Berquist,
Chief Deputy Clerk
United States District Court
514 United States Court House
Minneapolis, Minnesota 55401

Barbara Lindsey Sims, Esq.
Special Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota 55155

Donald J. Mueting, Esq.
Special Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota 55155

Eric Miller, Esq.
Oppenheimer, Wolff, Foster,
Shepard and Donnelly
1700 First National Bank Building
St. Paul, Minnesota 55101

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904
301-622-2804

Attorney for Petitioners

Done this twenty-fifth day of April, 1980.

Supreme Court, U. S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

79-1687

No._____

IN THE

Supreme Court of the United States

October Term 1979

In Re: LEON W. KNIGHT, ET AL.,
Petitioners.

DEFENDANT LABOR ORGANIZATIONS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ERIC R. MILLER
KEITH E. GOODWIN
DONALD W. SELZER, JR.
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IN THE

Supreme Court of the United States

October Term 1979

No._____

In Re: LEON W. KNIGHT, ET AL.,

Petitioners.

DEFENDANT LABOR ORGANIZATIONS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Did the three-judge District Court and the Court of Appeals abuse their discretion in refusing to re-open discovery beyond a deadline previously stipulated to by all counsel?

STATUTES INVOLVED

This case involves Federal Rule of Procedure 26.

STATEMENT OF THE CASE

On December 19, 1974, twenty Minnesota Community College Faculty members, by and with the assistance of the National Right to Work Legal Defense Foundation, filed the present lawsuit challenging the constitutionality of public sector collective bargaining in Minnesota under the First Fifth, Ninth, Tenth, Eleventh, Thirteenth and Fourteenth Amendments to the United States Constitution. Named as defendants were the Minnesota Community College Faculty Association ("MCCFA"), the Minnesota Education Association ("MEA"), the National Education Association ("NEA"), the Independent Minnesota Political Action Committee for Education ("IMPACE"), officers and employees of the aforementioned organizations (this group of defendants is referred to as the "defendant labor organizations"), and several public officials of the State of Minnesota. Plaintiffs requested the convention of a three-judge court pursuant to 28 U.S.C. § 2281.

The initial stages of the lawsuit dealt with issues of abstention and whether it was appropriate to convene a three-judge court to consider plaintiffs' allegations. On May 17, 1976, the Court of Appeals for the Eighth Circuit ordered the convention of a three-judge court and the Honorable Gerald W. Heaney, Earl R. Larson and Donald D. Alsop were subsequently impaneled to constitute that Court.

In an effort to provide structure and guidance, the three-judge court, through Judge Alsop, periodically communicated with the parties to monitor the progress of the case. Con-

sistent with this practice, the Court issued an order on September 25, 1978, scheduling a pre-trial hearing for October 13, 1978, for the purpose of determining the current status of discovery and to schedule preparation for trial. The October 16, 1978, order closing discovery was the direct product of the October 13, 1978, hearing and the Court's satisfaction that such order was appropriate given the ample breadth of discovery completed over the previous two and one-half years and the explicit representations by plaintiffs' counsel that they should have no difficulity completing discovery by mid-December, 1978. The transcript of the October 13, 1978, hearing, demonstrates that the date for discovery completion was arrived at by virtual stipulation of plaintiffs' counsel. During a general report to the Court regarding the status of the case, plaintiffs' counsel affirmatively represented that discovery was nearly completed and that the remaining portion could be finished by December.

> [By plaintiffs' counsel, Mr. Vieira]: Now as this summary prepared by Mr. Miller, recounts, we have been, since early in 1977, conducting depositions of various individuals who fulfilled the leadership roles in the NEA, MEA and MCCFA; their political action committees and so on. We have conducted 17 depositions, we have two that are scheduled for next week.
>
> The defendants have also produced, as this document recounts, quite a bit of materials that we are now analyzing and putting into form. We think we are getting just about to the end of what we consider is necessary to the presentation of the case. . . .
>
> * * *

> [The Court]: What is your time frame, how much time are we talking about from this point on?
> Mr. Vieira: . . . we ought to be able to get it done, if we really push it, by early December—mid-December. After that it is a matter of preparing a record and drawing up a motion. We have been doing that as we have been going along.
> The Court: From your standpoint we will complete all discovery by the 31st of December?
> Mr. Vieira: I think we can do that.

On December 30, 1978, plaintiffs moved for rescission of the District Court's December 31 discovery deadline and requested that sanctions be imposed on defendant labor organizations. One day before the agreed upon discovery deadline, plaintiffs served notice that they were charging defendants with a massive conspiracy to thwart their discovery rights and submitted for the court's review a 266 page brief, accompanied by a 10 volume appendix, all of which weighed 34 pounds. It was as if the pre-trial hearing of October 13, 1978, which was designed to and did in fact address discovery matters, never occurred.

On April 4, 1979, the District Court denied plaintiffs' motion. Plaintiffs' subsequent petition to this Court for a writ of mandamus was denied on October 1, 1979. On February 1, 1980, following oral argument, the United States Court of Appeals for the Eighth Circuit denied plaintiffs' petition to that court for a writ of mandamus. The Circuit Court denied plaintiffs' request for rehearing en banc on February 25, 1980.

ARGUMENT

I. THE COURTS BELOW HAVE NOT ABUSED THEIR DISCRETION IN REJECTING PLAINTIFFS' PETITION.

A. Plaintiffs' Allegations Of A "Conspiracy" With Respect To Discovery In This Case Are Specious.

For the past year and one-half defendant labor organizations and their counsel have been subjected to wholly unfounded and meritless allegations of misconduct before every court available to plaintiffs. At every turn, plaintiffs' arguments have been rejected. Despite the length of the papers submitted by plaintiffs to this and other courts, any analysis of the facts leads to the conclusion that there has been no conspiracy or "cover-up" here.

Defendant labor organizations have previously refuted the allegations in greater detail than would be appropriate in this context.[1] Plaintiffs have repeatedly relied upon a "logic" tainted by their own ambitions in this case: for example, wherever a witness testifies to something inconsistent with plaintiffs' pre-conceived notions about defendant labor organizations, the witness "must be lying." The pages of plaintiffs' allegations are laced with such flaws. At no time have plaintiffs forwarded persuasive evidence of any "conspiracy." Such evidence does not exist because there is no conspiracy.

The courts below have been rightly concerned with the eleventh hour nature of plaintiffs' motion, coming after a lengthy period of discovery during which no complaints were

[1] The Court is referred to the Defendant Labor Organizations' Brief in Opposition to Plaintiffs' Initial Petition before it, *Knight v. Heaney*, No. 79-75 (U.S. filed on August 18, 1979), with its appendices for more detailed argument concerning the groundlessness of plaintiffs' charges.

raised with the court, and the acceptance by plaintiffs' counsel of a December 31, 1979, discovery cutoff at the pre-trial conference on October 13, 1979. Plaintiffs now attempt to dodge the obvious consequences of their actions by asserting that they had no "record evidence" of the supposed conspiracy until after the pre-trial conference. However, weeks before the October 13 hearing, plaintiffs' counsel had engaged a group of private investigators to surreptitiously interview officials and employees of the defendant labor organizations in pursuit of their hope of establishing a "cover-up conspiracy." It is difficult to conceive of concerns sufficient to justify such an unusual and serious undertaking which were not sufficient to bring to the attention of the District Court. A review of the plaintiffs' original petition to this Court for writ of mandamus demonstrates that plaintiffs had a substantial amount of the "evidence" relied upon to establish the "cover-up conspiracy," including that which purportedly implicates defendant labor organizations' counsel, well before October 13. One would assume that a party would approach the court to seek its assistance in dealing with the problems supposedly encountered by plaintiffs.

Further, plaintiffs' present explanation for their failure to reveal their concerns to the court is inconsistent with arguments made in their initial petition to this Court. Therein plaintiffs argued that their agreement to the December 31 deadline was justified because "prematurely to have revealed the private detective's activities would have altered the UTP to what he had uncovered." This statement is based on the throughly inappropriate assumption that plaintiffs, through their private investigators, could more effectively deal with the alleged "conspiracy" than could a United States District Court. Further, it implicitly admits that plaintiffs' counsel

consciously elected not to disclose the supposed "conspiracy" during the October 13 pre-trial.

B. The Lower Court's Actions In Establishing And Adhering To A Discovery Deadline Are Well Within Its Discretion.

Plaintiffs' argument that a district court usurps power when it establishes discovery deadlines is premised on a fundamental misapprehension of the inherent power of the federal bench to control its docket and is contrary to the collective authority of the Federal Rules of Civil Procedure, the Manual for Complex Litigation and judicial precedent.

The Federal Rules of Civil Procedure are to be "construed to secure the just, speedy and inexpensive determination of every action." Federal Rules of Civil Procedure, Rule 1. Rule 16 of the same rules provide district courts with the authority to hold pre-trial hearings and to consider and rule on such "matters as may aid in the disposition of the action." Furthermore, Rule 83 allows district courts to promulgate rules of practice in their respective districts which are not inconsistent with the federal rules. Pursuant to that authority the judges for the District of Minnesota have promulgated local Rule 3(a) (Rule 4 prior to January 1, 1979) which provides that a judge in Minnesota may "prescribe such pre-trial and discovery procedure as he may determine appropriate."

This Court's recently ordered amendments to the Federal Rules of Civil Procedure further buttress this contention. 48 U.S.L.W. 4497 (May 6, 1980). New Rule 26(f) provides for discovery conferences at which the court, on its own motion, may issue an order establishing a "plan and schedule of discovery" as well as any "limitations on discovery." Significantly, those Justices dissenting from the adoption of the new

rules did so on the grounds that too few restrictions have been placed on the discovery process. Dissent of Justices Powell, Stewart and Rehnquist, 48 U.S.L.W. at 4499-4500. Plaintiffs' argument against the enforcement of a discovery schedule in this case is at odds with the current philosophy underlying the Federal Rules.

In addition to the authority in the Federal Rules of Civil Procedure, as set forth above, the Manual for Complex Litigation strongly encourages federal judges to exercise judicial control over complex litigation, stating:

> The trial judge has the undoubted power and inescapable duty to control the processing of a case from the time it is filed. In the complex case, the judge must assume an active role in managing all steps of the proceedings . . .
>
> A crucial step in the first phase of judicial management of the complex case is the prompt entry of an order initiating a pre-trial conference to provide early and efficient schedule of pre-trial discovery and preparation.

Manual for Complex Litigation (1977) § 1.10, page 15.

> At the second pre-trial conference, a schedule for filing all remaining discovery requests should have been established.

Manual for Complex Litigation (1977) § 3.10, page 120.

Courts have long recognized the power to manage their dockets. In *Landis v. North American Company*, 299 U.S. 248 (1936), this Court acknowledged "the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests

and maintain an even balance." 295 U.S. at 254-255. *See also, Greyhound Lines, Inc. v. Miller*, 402 F. 2d 114, 144 (8th Cir. 1968); In Re AIR CRASH DISASTER AT FLORIDA EVERGLADES ON DECEMBER 29, 1972, 549 F. 2d 1006, 1012 (5th Cir. 1977).

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUE WARRANTING GRANT OF CERTIORARI.

This petition purports to raise questions concerning the ruling by a district court on matters of pre-trial discovery, after a lengthy period of discovery under reasonable supervision by the lower court. Despite plaintiffs' lofty claims of constitutional implication, the instant dispute amounts to little more than a case of dissatisfaction with the facts revealed through the discovery efforts. The lower courts' rulings are tied to a review of the facts of this particular case and the conduct of these particular parties during discovery. No amount of recitation of inapplicable constitutional provisions, or use of "conspiracy" language can elevate this dispute beyond that. It is submitted that nothing is presented here which warrants yet another hearing concerning plaintiffs' groundless allegations.

CONCLUSION

Defendant labor organizations urge that plaintiffs' petition for Writ of Certiorari be denied.

Respectfully submitted,

ERIC R. MILLER
KEITH E. GOODWIN
DONALD W. SELZER, JR.
MARK D. ANDERSON
OPPENHEIMER, WOLFF,
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DONNELLY
1700 First National Bank
Building
Saint Paul, Minnesota 55101
Attorneys for Defendant
Labor Organizations

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-74 Civ 659

LEON W. KNIGHT, et al., Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY, et al., Defendants.

Motion in the above entitled matter came on before the Honorable Donald D. Alsop, one of the Judges of the above Court, at St. Paul, Minnesota, on October 13, 1978, commencing at 9:30 a.m.

Appearances:

WILLIAM E. MULLINS, Esq.
and EDWIN VIEIRA, Jr., Esq.
Appearing on behalf of
Plaintiffs
DONALD J. MUETING, Esq.,
ERIC MILLER, Esq., and
STEPHEN BEFORT, Esq.,
Appearing on behalf of
Defendants

[2] Whereupon, the following proceedings were had:

The Court: It seems to me I might just as well go with that Knight matter first because I don't think that will take us 15 minutes, and rather than have all those other lawyers wait, I think we can take care of that.

So, if you want to wait just a moment—what is your pleasure? Do you want to wait a few minutes?

Mr. Mingo: We can come back.

The Court: Whatever is more convenient to you. Do you want us to take a break? I leave it up to you.

Mr. Mingo: We will take a break.

The Court: We will let you know.

Two things come to my mind: First when I see Mr. Mullin I should tell you that last weekend I, among other things, read a book entitled the Sixth Word by Mr. Lebedoff (ph) as I am sure you have read. I have had Mr. Opperman in my court any number of times and somebody told me because of that I should read the Sixth Word and on the first page it was all about William Mullin.

Mr. Mullin: I want the Court to know that in the ten years that have elapsed since that book was written I have changed my ways. Anything you have read in that book would not now be applicable.

The Court: I'll let that pass. But, it was interesting, I had read the 21st Ballot previously. I like his [3] style of writing.

Secondly, about a month ago, or three weeks ago I had my able assistant Ms. Palmer prepare a list of cases '74 and earlier. I came on the bench in January of '75, so anything '74 and earlier are cases that I came to by way of inheritance. The rest of them I have to assume full responsibility for and I am delighted to report that yours was on that list and the list is down to about eight or ten now, maybe six. You people will soon have the distinction of having the oldest case on my calendar or thereabouts; which may or may not be considered a distinction, and I thought I haven't looked at your case for so long I kind of lost track of it, or what is going on to be sure, and I thought it might be helpful—I know it would be helpful

to me at least if we could just get together for a few minutes and have you tell me where we are at and where we are going, and how we are going to get there.

As we all know it is now a three judge case and there is nothing I can do with it except to see how it is doing and report to my brethren as to what we might expect in the future. I see you have 50,000 pages of documents produced, among other things, and knowing my other two brethren on the three judge panel, they are going to be overwhelmed when they see that number.

For the plaintiff who wants to tell me where we are at and where we are going or how we will get there and what we [4] should do to do something with the case.

You are from Washington, as I remember?

Mr. Vieira: Maryland, sir.

The Court: All right.

Mr. Vieira: The first thing I want to assure Your Honor of is we have no intention of asking Your Honor, or the other judges to read any 50,000 pages of documents. I have had the unfortunate pleasure of looking at most of those pages. Our intention is to, as much as possible, to distill that material, synthesize it, and get it in tabular and summary form and present it in that fashion; in what we hope will be a convenience for both the Court and clerks to deal with.

Now, as this summary prepared by Mr. Miller recounts, we have been, since early 1977, conducting depositions of various individuals who fulfilled leadership rolls in the NEA, MEA, MCCFA; their political action committees, and so on. We have conducted 17 depositions, we have two that are scheduled for next week.

The defendants have also produced, as this document recounts, quite a bit of material that we are now analysing and

putting into form. We think we are getting just about to the end of what we consider is necessary to the presentation of the case and we hope that as soon as that is finished we are going to be able to prepare more or less straight forward summary judgment motions, no hearing, calling of witnesses, and [5] so forth being required; that all of the constitutional issues at least can be decided on the basis of documents that have been produced and introduced as exhibits in depositions, and on the basis of depositions and affidavits. So there won't be any necessity for any prolonged proceedings.

It is no secret to anyone connected with the case that the plaintiffs' position here is that the NEA and various other organizations constitute something very much akin to a political action organization or political party. That is what we are trying to prove. There is no dispute about that. There has never been any dispute as to our contention. We think now that we have reached the crux of the case because the two witnesses that are to be called next week, Roslyn Baker (ph) and Stanley McFarland (ph), are two of the leading figures in the NEA's Governmental Relations Department; and we believe that they have had, during 1976 and perhaps earlier, significant and substantial contacts with particular politicians, candidates for elective office, and in particular Mr. Carter and Mondale, they were very much involved, along with others, with the NEA and affiliate organizations in that 1976 Presidential Campaign.

Besides those two individuals we have subpoenaed five others, four of whom are on Mr. Carter's staff in the White House —Hamilton Jordan being one figure I am sure you are familiar with by name, and at the present time we are having discussions with their counsel in Washington for the production

[6] of affidavits or documents from them so we won't have to bother with any depositions.

Our plan is a very simple one, I hope it is a straight forward one, as soon as we are finished with Baker and McFarland next week we have at present a list of four or six people, at the most six, that we would want to call to finish up the depositions.

As Mr. Miller has suggested here on this summary, there are some documents, six requests for the production of documents that the NEA and MEA have yet to produce. We think we will have another couple of pages of document requests, especially after we have heard from McFarland and Baker.

After that, as far as we are concerned, we think we will have adduced all the evidence that we believe is necessary to prove the contentions that we have made.

The Court: You are intending to make a motion for summary judgment to be attached with an outline or a synthesis, as you call it, of the documentary evidence whether it be by way of deposition or documents that have been produced up to this point?

Mr. Vieira: What we hope to do is take the relevant portion of all of the documents, all the documents have been introduced at one state or another, or they will be by the time summary judgment comes up, we will take the relevant pages out of those documents and prepare a large appendix to our [7] summary judgment brief, cross-referenced completely to the brief and to the depositions, and so forth and so on, and that would be what would be presented directly to the Court.

The Court: At one time there was the hope that we could prepare—you could prepare a stipulation of undisputed facts. Now I know you put some energy on that but I have the feeling that maybe it was not productive. What is your—

Mr. Vieira: Well, it was and it wasn't, Your Honor. We presented the defendants with 300 or so requests to admit certain facts and they admitted some and they denied others and we had conferences with them over the various types of language that we wanted or they wanted. Sometimes we compromised and sometimes they did; and sometimes neither of us did. The short answer was the final request we made, which was that the defendant organizations, the NEA, MEA, MCCFA, and so forth, are substantially engaged in certain types of political activity was denied and that is the ultimate conclusion of fact that we are trying to prove.

The Court: Were there any fact, or was there any stipulation of undisputed facts of any kind that either has been or will be produced so that we have some framework within which to operate?

Mr. Vieira: Yes, sir. I am not sure of the number, maybe Mr. Miller can suggest it, but there is a goodly number of the requests to admit that were admitted and I don't [8] think we are going to have any problem with respect to Mr. Mueting's defendants, that is the State officials, as to how the MCCFA was certified, how the collective bargaining agreement was negotiated, what the MCCFA has been doing with respect to the Community College Board—

The Court: I am talking about a document that will be described as a stipulation of undisputed facts rather than having to go back through the requests for production, or the requests for admissions, and make—go back and dig into this file. Is there going to be a document which will have a stipulation of undisputed facts, at least to the extent that there are certain facts about which there is no dispute? I thought that you had put your efforts and energy towards trying to produce that; and I also thought it wasn't successful, but it seems to me there

must be some things which would give us as judges a framework to start with and say, "these are the undisputed facts". To be sure there will be other disputed facts, but has there been any effort to generate such a document?

Mr. Vieira: No. Aside from the work we did on the request to admit, we haven't sat down—

Mr. Mullin: I should add Mr. Mueting and I have been working on a document between the plaintiffs and the defendant State officials that would summarize the mechanics of the operation of the statute that is under challenge; and there are really no disagreements we know of about language. We have been [9] discussing this document because of the pendant—the fact that other discovery has been pending we haven't finalized it, but with respect to those matters and with respect to—perhaps with respect to other mechanical matters we can work out with the defendants, such documents are possible here, Your Honor.

The Court: It seems to me there must be some areas about which there is no substantial dispute on the facts. To be sure there may be others about which there is substantial dispute, but it seems to me that the attorneys—I will hear from all of you—that the attorneys ought to be able to prepare a statement of uncontroverted facts—not agreeing they are all relevant or they all have bearing on the issues, but at least to give us a starting point from which to work. I think that that would be helpful to myself, at least, and helpful to the other judges too.

What is your timeframe, how much time are we talking about from this point on?

Mr. Vieira: The thing that has actually taken the time in these depositions from '77 to today has not been the time that has been used in the depositions. Like I say, we have 17 people

so far. Most of the depositions have been one day to two days, some half a day, so it is about 35 days total. What has been the actual time lag has really been a scheduling matter. We have bent over backwards not to try to call in Mr. Miller's people when they have had some other commitments and [10] so on and so forth.

I think with respect to the ones we are talking about after Baker and McFarland we ought to be able to get it done, if we really push it, by early December—mid-December. After that it is a matter of our preparing a record and drawing up our motion. We have been doing that as we have been going along.

The Court: From your standpoint we will complete discovery by the 31st of December?

Mr. Vieira: I think we can do that.

The Court: And, how much time would you need to prepare the motions and your supporting material and background data?

Mr. Vieira: I think if we had at the outside 45 to 60 days we can put the whole thing together. We have been working at it as we go along but as Mr. Miller suggested there is a lot of material here, you are talking about an organization that has 1.8 million members.

The Court: All right. Now who should I hear from first, the State or the organizational defendants? Do you represent all of the employee organizations?

Mr. Miller: We do, Your Honor.

To try to avoid a depressing note, when Edwin recites that there are a million eight NEA members they certainly are not all involved, although there has been times I have wondered [11] in light of the scope of discovery.

The summary I have prepared, Judge, I won't go over. You have had a chance to previously review it, there has been a substantial amount of discovery in this case.

The Court: This summarizes the discovery that has taken place to date?

Mr. Miller: It does.

The Court: All right.

Mr. Miller: The brunt of it has taken place in a little over two years now, We have been doing nothing but discovery. As the summary indicates we have answered over 350 interrogatories. We have produced over—

The Court: Excuse me for interrupting, you will be happy and thrilled to know at our Judges meeting yesterday we adopted the Minnesota practice, as in Chicago, or the Northern District of Illinois, of limiting written interrogatories to fifty. That works in State court pretty well, doesn't it?

Mr. Miller: It does, Your Honor, on a certain number of cases.

Mr. Mullin: It's too late.

Mr. Miller: I could add it is too little, too late. We have answered more than 350 to date. Our estimate of 50,000 pages is a conservative one. There are some more documents which we have consented to produce and we are going to produce very shortly, so the number is going to be edged upward.

[12] We have had a substantial number of depositions, and by just the titles of the people, Judge, you can see that all of the principles and some folks who would probably rank in the next echelon in terms of officers and professional staff of all of our clients have been deposed; along with at least one of the State defendant officers.

We have responded to 381 requests for admission. Let me stop on that point: those admissions or requests, Judge, consisted of this book right here and then another stack about another ten to twelve inches in height of documents. We have admitted to the authenticity of every document that has been

submitted to us that has been produced in the course of discovery. I won't show you the responses we put in, but in answer to your inquiry we have admitted to a substantial number of fundamental facts in this case.

We had suggested a long time ago, as I recall a year ago this last summer, that we try our hand jointly at a stipulation of facts. We have had some encouragement from Your Honor on that point. Now we started out in that vein but it ended up with the plaintiff submitting requests for admissions. We had difficulty with some of these requests and we have either denied them or some of them we have admitted in a limited fashion.

If we were to take our responses to those requests for admissions we would come up with a fairly fundamental framework in terms of admitted facts. I do not know how much beyond [13] that the plaintiffs intend to persist on their characterization of the facts. I am at a loss, therefore, to frankly report to you where I think we are going to end up in being able to completely stipulate and agree to the facts.

I will be candid with you in light of what I perceive to be some of the purposes or goals of the lawsuit. I don't think we are going to be able to completely agree. I think we are going to be in conflict on certain facts and we may very well have to return to the Court and I think we are going to have to, to seek some direction from you as to how we are going to handle that, whether it is going to be handled in affidavit form or whether we are going to have to have perhaps some limited live testimony.

In terms of what I perceive to be the first things first, Edwin has given us a schedule as to when he thinks he can complete his discovery and that is by year end. In my view the discovery should terminate upon the completion of those

two depositions that he has referenced next week which are to be taken in Washington, D.C., all next week; and upon our producing the documents that remain.

I don't want to take the Court's time any more than to tell you the remaining documents to be produced consist of correspondence out of the Central Administrative Offices of the NEA; consisting of a fair amount of material. All of that material has already been produced on behalf of the other employee organizations. [14] I find it very difficult to understand the necessity for up to six or more depositions, assuming that they are of my clients, I find it very difficult to understand what additional documents are going to be requested, as recited by Mr. Vieira, after the two depositions are taken next week.

I will be very candid with you, we have been very open in terms of responding to this discovery. We have not come to Your Honor in terms of seeking protective orders and the like; we have gone, I believe, more than—to use a very poor pun —our fair share in responding to this discovery. I think it should terminate and, very frankly, if we are going to receive some additional discovery requests I will place everyone on notice that we may have to return to the Court in order to limit that discovery. We have had a lot of discovery, it has been expensive, and the 50,000 pages that I mentioned, as I say, one, is conservative; those pages have been plucked out of many more times than 50,000 pages to arrive at those. My office has spent a lot of time in Washington, D.C., looking through records there as well as here in Minnesota. We are not interested in going any further.

I would, I guess, urge the Court to consider cutting off discovery or, at a minimum, placing a date for that discovery which the plaintiffs want to propose to be submitted so that

we can immediately assess it and if we have to, return to Court.

[15] We want to get the case underway in terms of first completing discovery and get it on for a motion. It has been pending four years this December.

The Court: All right. Who is going to tell me about the State's position?

Mr. Mueting: Your Honor, Don Mueting from the Attorney General's Office. As Mr. Mullin indicated we have been working on a proposed stipulation of facts. I really can foresee no difficulty in arriving at a stipulation of facts to indicate to the Court the workings of the Public Employment Labor Relations Act, with regard to the relationship between the State defendants and the Minnesota Community College Faculty Association.

We have been waiting in the bullpen, so to speak, during this entire period. We haven't been intimately involved in the discovery, we have been monitoring it. I really can foresee no problems in arriving at a stipulation. We have discussed it in some detail and there really aren't any factual disputes with regard to the application of the Act in this particular instance.

We also will, I might add, talking about a second stipulation, in which a number of parties will be added to the lawsuit. Since it was filed in 1974 we have had some changes on the Board, Community State Board for Community Colleges, and we have had changes with regard to presidencies of colleges involved. [16] So, that will also be taken care of by way of stipulation.

Other than that, Your Honor, we are prepared to go to trial whenever the other parties are.

The Court: When you say trial, what do you envision a trial—what form do you envision it to take from your point of view?

Mr. Mueting: From our point of view I think we can handle it by way to stipulation on all facts. I don't think there is anything in dispute and summary judgment would be entirely appropriate as far as we are concerned.

The Court: As far as the State defendants are concerned, your discovery is completed?

Mr. Mueting: I believe we have supplied the plaintiffs with everything they have asked for.

The Court: I am talking about your discovery.

Mr. Mueting: Ours is completed.

The Court: So the State discovery is completed in the sense that you don't have any more to do?

Mr. Mueting: That is right.

The Court: Now do you anticipate making a motion for summary judgment on behalf of the State defendants so that the matter would be submitted to us on motion for summary judgment by all parties or will you just—how will you handle it?

Mr. Mueting: We haven't really decided how we are going to handle it. We were waiting actually to find out [17] what is going to happen between the plaintiffs and the employee defendants; to see how they are going to resolve their differences.

We will be prepared, if that seems appropriate, to submit this on motion for summary judgment, but we haven't made that decision at this time yet, Your Honor.

The Court: How about the discovery—I think that is all for your part, Mr. Mueting—How about the discovery for the organizational defendants that they want to initiate? Does that complete it?

Mr. Miller: Yes. We have taken one deposition as reported in that summary. We do have some outstanding interrogatories to the plaintiffs which have not been answered; and depending on the road before us on stipulating, we may have some difficulties in that we served interrogatories—those which have been answered we were essentially told in response to contention interrogatories, we just went down their complaint and asked them for the facts underlying various allegations such as misrepresentation by some of my clients concerning what the Fair Share fee included. The response that we were uniformly given was we are still in the course of discovery and we will tell you in our trial brief. Well, that is not completely satisfactory from our point of view. If we can work out the stipulation of facts so that we understand which facts the plaintiffs in fact are relying upon in their complaint, we won't [18] have much trouble. But I do want to alert the Court that there are some—what I perceive to be potential, outstanding, problems in terms of arriving at an agreement on these facts.

A brief review of the requests for admissions I think will probably give Your Honor the best idea of the differences between the plaintiffs and my clients.

The Court: I am not suggesting that I am in a posture, nor do I feel the case indicates that I can expect that you would stipulate to all facts. Obviously there are going to be some differences of opinion as to what these depositions show. But, at the same time, there has to be a large area of facts about which there is no dispute and rather than for us three judges to sit down and browse through 18 depositions, or whatever number there are, it seems to me that the orderly fashion to do it is to have the attorneys prepare a stipulation of facts to the extent that they can. They are undisputed facts.

Mr. Miller: There is no dispute on that Judge. We have tried to do that, and we have done it in part through those requests for admissions.

The Court: All right. Now are you going to be making a motion for summary judgment or are you going to rely on letting the—suppose that the plaintiff were to make a motion for summary judgment and we were to deny that motion. We still have a lawsuit pending. Where are we at then?

Mr. Miller. Your Honor, I anticipate that assuming [19] we reach an understanding first on the facts that we can agree on, and we have an idea of what we cannot agree on, that all of us, all three corners of the lawsuit, I would anticipate would be before the Court on cross-summary judgment.

The Court: So you anticipate making such a motion too?

Mr. Miller: Yes, sir.

The Court: Even though you say there is a possibility that you would have to—you would want to present some live testimony?

Mr. Miller: That may be a possibility and if we cannot work out a mechanism for resolving that conflict, then we may have to go to that; or by affidavit.

The Court: Have I heard everybody now? Have you got any more you want to add in light of what these people have suggested?

Mr. Mullin: I think it might be helpful if I comment a little bit on the attempts to develop a stipulation of facts that have taken place so far.

We had discussions with the attorneys for the defendant labor organizations and it was agreed on both sides that the plaintiff should initiate the procedure and that—and get the ball rolling by presenting them with something in writing. And, as you have already been told we decided to do that in

the form of request for admissions without the formality and the [20] requirement of response would be helpful in moving things along. So, we did prepare and serve on defendants 300 plus requests for admissions. Each one of those requests contained with it an interrogatory. The interrogatory requested that the defendant, if they denied the request, that they state what it was about the request that required the denial.

The responses that we received, as you have already been advised did move things along substantially in that there were substantial admissions as to the authenticity of documents. We are not going to have any problems that I know of with respect to the fact that a document is what it purports to be.

With respect to any attempt on our part in the request for admissions to describe, characterize, summarize, or generalize with respect to what the defendant labor organizations do, and what they are, we had a flat denial and the interrogatories were not answered because they were objected to uniformly.

So, as Mr. Vieira said we had extensive meetings in which we satisfied ourselves that the problems with these denials had to do with generalizations, descriptions, characterizations, and attempts to summarize what the defendant labor organizations do and what they are; which is at the heart of our case.

So, at the conclusion of these discussions we said [21] we feel we have—both sides agree we have gone as far as we could with our attempts to present this. So, we then said, "well, you try it". If you think our characterizations are loaded or unfair, or so on, you try a neutral characterization. We were then told that—by the defendant labor organizations—that that is not our job, it is your job and we are not going to do it. So, we got no feedback from them as to how they felt what they do and are could be summarized and characterized. We then said if you are not going to do that, that means that we are

going to have to establish what these payments do and are. I think I used the words that that is going to require the writing the history of World War II; and we were told so be it, that is too bad, if that is the way it is going to be, fine.

That is the context of it, of the problem that the plaintiffs have been working on in getting the discovery that they have taken, taking the depositions and the like.

The only thing I can say is that in working on that problem from our side, we have fought long and hard about how to summarize—perhaps not in an agreed summary, but in a summary that we can present to the Court, all the documentation that we have gathered so that the limit that the Judges will be required to read will be as little as possible. We recognize that that is a very—next to winning the case, that is the most important thing that we have on our minds right now. We are going to do everything we can to accomplish that. We do not [22] anticipate presenting any live testimony. I want to make that clear right now. I don't know what other parties have in mind when they say they might require —might do that. We are not going to do that.

The Court: I can tell all of you that there is an extreme reluctance on the part of all of us, I guess to start taking live testimony in a three judge court case.

Mr. Mullin: We understand that.

The Court: You all understand that?

Mr. Mullin: And we are, from the beginning, we have been aware of that reluctance and we have never planned to do that.

So, what you are going to get from us is going to be fairly large in terms of the number of documents that back up our summaries and characterizations, and so on; but we do not anticipate that every piece of paper that we present to the

Court to summarize our characterizations and generalizations will have to be read.

I would imagine that only with respect to the ones that the defendant labor organizations really hone in on and say that is really not true, or we really didn't have the kind of involvement that you are saying we had and for example in the 1976 Presidential election it may be necessary for some reading of documents to satisfy the Judges as to who is right.

Anyway, I just want you to know we are aware of [23] the Court's concerns and we are working as hard as we can to meet them.

The Court: Well, I am going to do this: There is no way I can judge the appropriateness or inappropriateness of the four or five additional depositions to which you make reference to, Mr. Vieira, but number one, I will report to the other judges the summary that you have given to me; and just in a brief way your observations today.

I will issue an order which does two things, it closes discovery in the case on the 31st of December—so if you want to take any additional depositions or whatever else you want to do by way of your discovery, it will all be completed by December 31st. Now that may also involve your producing documents or answering outstanding interrogatories of the defendants, and if you are not satisfied with the answers that you get in that connection, then the only thing I can suggest is that you will have to bring on a motion to compel additional answers. You have done a lot of work together, I know, and I encourage you to keep doing that.

Mr. Mullin: Your Honor, with respect to that, Eric is correct in saying that we have declined to respond to some of these interrogatories that have asked the plaintiffs what it is we do and/or are that you object to; what it is about us that

makes you complain about having us as your exclusive representative and being required to pay money to us.

[24] It is true and I should advise the Court that we probably will not be able to amend those interrogatories until we have completed discovery, so—

The Court: Well, you have got now two and a half months within which to do it.

Mr. Mullin: I understand. What I am saying is it probably will require some time and it should be a short time after December 31; discovery having been completed by December 31, for us to come back in and say—these are really contention interrogatories, they are not disclosing any facts that we have and are holding back, it is just a question of characterizing them, the evidence that has been developed in the case.

With respect to that I would ask the Court that there be—that we be permitted say another 45 days in which to answer those interrogatories, or 30 days.

The Court: I am going to suggest to you that I want a stipulation of undisputed facts prepared and in to me by the 30th of January. Now if there are contention interrogatories that you need some additional time for, it seems to me you should be able to have those answered in the context of this time frame by mid-January. So, if you want some additional time to answer those so-called contention interrogatories, if I give you to the 15th of January that ought to take care of it.

All right, December 31st discovery will be closed except as to so-called contention interrogatories. I encourage [25] you to do it before that, but if you can't, you will have until January 15 for those.

Simultaneously with that I want you to continue your efforts on this stipulation of undisputed facts. It seems to me

that by the 30th of January, or do you want another week on that, it doesn't—well it does make some difference to me—does that give you enough time, that four week period in January?

Mr. Miller: We will sure try.

Mr. Mullin: We will take a crack at it.

The Court: Let's say January 30, 1979, and then what I will do is schedule another get together like this, even now, for the last week in January so we can get together and see how you are doing and if we are on track, and encourage you to be on track because I know how much work you have put on this thing—I can tell by the file that you have been busy—so we will schedule another pre-trial for late January or early February and then, at that time, we can decide how you are going to present the thing by way of your motions or cross-motions for summary judgment, or however.

It seems to me the way to do it is to have three motions for summary judgment, all right?

There are two things that are just impressions that I have about this: Number one is a case out of Detroit and number two is the fact that the Statute has been changed or modified. Now are you addressing the case to the Statute as it [26] now exists, I assume?

Mr. Vieira: Yes.

The Court: Even in its modified form?

Mr. Vieira: Yes.

The Court: All right. So it is a current Statute that we are going to be concerned with?

Mr. Vieira: Yes.

Mr. Miller: That is my understanding, Your Honor. An earlier challenge to the Robinsdale case, which I think the Court is aware of, was addressed to the Fair Share Statute as it existed prior to its amendment in April of 1976—

The Court: Is that the case Judge MacLaughlin wrote?

Mr. Miller: That is the case Judge MacLaughlin wrote and it went to the U.S. Supreme Court and the U.S. Supreme Court denied to hear it on the basis it was moot because the statute had been amended since the State Supreme Court had decided the Robinsdale decision.

The Court: All right. Is that all? Thank you for today.

(Whereupon the proceedings came to a close)

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[27] REPORTERS CERTIFICATE

I, Lawrence P. Lindberg, do hereby certify that the foregoing is a true and accurate transcription of the stenographic notes taken by me in the above-entitled matter.

LAWRENCE P. LINDBERG
Official Court Reporter